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No. 86-399

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W.R. GRACE & CO.,
Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents.

BRIEF OF FIBREBOARD CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondent, Fibreboard Corporation, makes the following statement disclosing parents, non-wholly owned subsidiaries and affiliates:

Fibreboard Corporation:

Louisiana Pacific Corporation

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INTRODUCTION

Fibreboard Corporation ("Fibreboard") files this Brief in Opposition to the Petition of National Gypsum Company ("National Gypsum"), United States Gypsum Company ("US Gypsum") and W.R. Grace and Co. ("Grace") for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. These three petitioners seek review of those portions of the Court of Appeals' judgment in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986), which vacated certification of a mandatory class under Fed. R. Civ. P. 23(b)(1)(B) for punitive damages and which affirmed denial of class certification under Fed. R. Civ. P. 23(b)(2).

In this case, plaintiffs seek certification of a nationwide class of all elementary and secondary schools to recover the costs of inspecting, testing and abating myriad asbestos-containing products in school buildings across the country. Plaintiffs have sued over 50 defendants which had varying roles in the mining, manufacturing, distribution and installation of numerous different asbestos-containing products. Plaintiffs' claims do not relate to any single product or incident, but rather involve many distinct products used for a wide range of purposes at different times in different locations over a time span of more than thirty years.

Plaintiffs' claims are based upon alleged state law causes of action for negligence, strict liability, intentional tort, breach of warranty, concert of action and civil conspiracy. Resolution of plaintiffs' claims will require the determination and application of the different laws of over 50 jurisdictions which separately govern liability for defective products under the different causes of action in each separate jurisdiction.

On September 28, 1984, the District Court certified a voluntary class for compensatory damages under Fed. R. Civ. P. 23(b)(3) and a mandatory class for punitive

damages under Fed. R. Civ. P. 23(b)(1)(B). *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984). The District Court denied class certification under Fed. R. Civ. P. 23(b)(2). On May 1, 1986, the Third Circuit Court of Appeals affirmed the District Court's certification of a class under Rule 23(b)(3) for compensatory damages and the denial of class certification under Rule 23(b)(2). The Court of Appeals vacated the District Court's certification of a class under Rule 23(b)(1)(B) for punitive damages.

On July 29, 1986, Celotex Corporation and others[1] filed a Petition for Writ of Certiorari seeking review of the Third Circuit's affirmance of the District Court's certification of a voluntary, nationwide class under Rule 23(b)(3) for compensatory damages.

National Gypsum, US Gypsum and Grace seek certiorari on grounds other than those articulated by Celotex. Fibreboard opposes the contentions that a nationwide class should be certified under Rule 23(b)(1)(B) or 23(b)(2) on the grounds that this case does not meet the minimum requirements for class certification under Rule 23. Should the Court grant both Petitions, it will be apparent that any class treatment is inappropriate in this particular case.

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1. Carey Canada, Inc., Fibreboard, GAF Corporation, Flintkote Company, Lac D'Amiante du Quebec, Ltee., Owens-Corning Fiberglas Corporation, Asbestos Corporation, Ltd. and Bell Asbestos Mines, Ltd. *See Celotex Corp. v. School District of Lancaster, petition for cert. filed*, 55 U.S.L.W. 3114 (U.S. July 29, 1986) (No. 86-140).

REASONS FOR DENYING THE WRIT

I. This Case Does Not Meet Rule 23 Requirements

Petitioners implicitly suggest that a nationwide mandatory class action should be certified in every mass products liability case, including the instant one, to avoid relitigation of allegedly common fact questions in courts across the country with resultant inconsistent judicial rulings and costly trials subjecting petitioners to repetitious and excessive punitive damages claims. What petitioners overlook is the unique nature of this particular case which forecloses its class treatment under any subsection of Rule 23.

A. Lack of Questions of Law or Fact Common to the Class and Lack of Typical Claims Required Under Rules 23(a)(2) and (a)(3)

Rule 23(a) contains minimum prerequisites which must be satisfied before an action may be maintained as a class action under Rule 23(b). Rule 23(a)(2) requires the presence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The three petitioners herein seek class certification as to punitive damages under Rules 23(b)(1)(B) and (b)(2). However, such certification is precluded because the minimum requirements of Rule 23(a)(2) have not been satisfied.

This Court stated in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982):

> Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and they "turn on questions of law applicable in the same manner to the class. . . ."

Id. at 155, *quoting Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

One commentator has included in the category of "[p]roblem areas for common questions. . ." those "actions in which liability is governed by state law provisions and the causes of action of class members accrued in different states." 1 H. Newberg, *Newberg on Class Actions* §3.11, at 160-161 (2d ed. 1985). This case fits within the "problem areas for common questions" because of its unique nature. This litigation involves very different products which were used for numerous purposes at various locations over many years. These products differed in composition, size, color, appearance, fiber content and degree of friability. The defendants performed distinct functions with respect to varied products at different times and in different locations across the country.

In view of the unique nature of this case, there are few, if any, of the significant common questions of fact required under Rule 23(a)(2). The issue of whether any particular defendant's conduct warrants the imposition of punitive damages will vary as to time, plaintiff and defendant. A particular defendant's awareness of the dangers of asbestos at any given time will be germane to each plaintiff's case and will vary over time from defendant to defendant and from product to product.[2] Related factual questions include each individual defendant's knowledge about the proposed use of varied products by each plaintiff and the relationships, if any, that existed between plaintiffs and defendants at any given time.[3]

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2. Illustrative of how evidence must be tailored to different time periods is the case of *City of Greenville v. W.R. Grace and Co.*, 55 U.S.L.W. 2039 (D.S.C. June 11, 1986) (No. 85-1693). In *City of Greenville*, one of the proofs offered by plaintiff was that Grace sold asbestos-free products for use in the Northeast, but continued to sell asbestos-containing products in parts of the South in the early 1970's. This evidence would, of course, not be relevant to claims that Grace sold asbestos-containing products in the South in the early 50's.

3. For example, in *Harrigan v. United States*, 63 F.R.D. 402 (E.D. Pa. 1974), a medical malpractice suit against the Veterans

Other fact questions which are not common and which may be relevant to punitive damage issues are the motives of each individual defendant, the extent of harm to each plaintiff, the wealth of each defendant and prior and potential awards in other cases. *Restatement (Second) of Torts* §908, comment e (1979).[4] Thus, the issue of punitive damages should be addressed on a case-by-case basis and class treatment is inappropos because of the lack of common factual issues required by Rule 23(a)(2).

There is a corresponding lack of common legal issues which prevents satisfaction of Rule 23(a)(2). Following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and this Court's recent decision in *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985), the Third Circuit acknowledged that the varying laws of over 50 jurisdictions will eventually have to be applied to the claims in this case. *See School Asbestos Litigation, supra*, 789 F.2d at 1010. State substantive laws on punitive damages vary from jurisdiction to jurisdiction and raise very uncommon questions of law.

Standards for the assessment of punitive damages are very dissimilar. For example, although most jurisdictions permit awards of punitive damages in addition to compensatory damages, Connecticut, Georgia, Michigan and New Hampshire treat punitive damages as essentially compensatory in nature.[5] Indiana, Louisiana, Massachusetts and Washington either partially or totally prohibit punitive damage awards.[6] In certain states, pu-

Administration was denied class treatment because operations were performed by different doctors upon different patients in various states, a situation similar to the varying relationships existing between individual plaintiffs and defendants in the instant matter.

4. *See also* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* §6.09 at 31-39 (1981); 3 H. Newberg, *Newberg on Class Actions* §17.30, at 411 (2d ed. 1985).

5. *See* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* §§4.02-.06, at 2-8 (1981).

6. *Id.* §§4.07-13, at 8-12.

nitive damages are allowed by common law or by statute and are not permitted in some states if the defendant is subject to criminal prosecution.[7] In some states allowing punitive awards, there have been different legislative or judicial guidelines as to the type of conduct in which a defendant must have engaged to warrant assessment of punitive damages.[8] Some states do not require an award of compensatory damage to sustain an award of punitive damages, while others require that at least nominal compensatory damages must be awarded.[9] Some jurisdictions require a reasonable relationship between the amounts of compensatory and punitive damages awards, while others do not.[10]

Evidentiary standards relating to punitive damages also differ from jurisdiction to jurisdiction. Several states admit evidence of criminal sanctions against a defendant and a defendant's financial status to counter excessive punitive damage awards.[11] There is also substantial difference among the jurisdictions on whether punitive damages must be consistent with the underlying cause of action to be awarded or whether they must depend, not upon the nature of the underlying cause of action, but upon the nature of the individual defendant's conduct.[12] Disparate burden of proof standards also exist

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7. *Id.*, Table 4-1, at 26-30 (Supp. 1986).

8. *Compare Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103, 1110 (1974) *with Franklin Music v. American Broadcasting Co.*, 616 F.2d 528 (3d Cir. 1979) (applying Pennsylvania law) *and King v. Allstate Ins. Co.*, 272 S.C. 259, 251 S.E.2d 194, 196 (1979), *quoting Cox v. Coleman*, 189 S.C. 218, 200 S.E. 762, 764 (1939) *and Inland Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn. 1975).

9. *See* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* §5.37, at 108-10 (1981).

10. *Id.* §39, at 112-16.

11. *Id.*, Table 5-4, at 152-55; Table 5-5, at 144-47 (Supp. 1986).

12. *Id.* §§6.15-.18, at 54-70.

among the jurisdictions.[13] Differences exist on the issue of apportionment[14] and contribution.[15] Some states do not allow remittitur of excessive punitive awards.[16]

The foregoing brief survey underscores the disparity among state substantive law which raises very uncommon questions of law.[17] The District Court would be required to master the law on punitive damages in every

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13. Two states have statutes dealing specifically with punitive damage awards in product liability actions. Oregon requires proof "by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others." Or. Rev. Stat. §30.925 (1979). Connecticut requires only proof of "reckless disregard" by a product supplier "for the safety of product users, consumers, or other who were injured by the product." Conn. Gen. Stat. §52-240b. Other states have general punitive damage statutes held applicable to product liability cases. Minnesota has adopted a "clear and convincing" burden of proof standard, Minn. Stats. Ann. §549.02, while Colorado requires proof beyond a reasonable doubt. Col. Rev. Stat. §13-25-127(2). Other states having general punitive damage statutes applicable to product liability cases do not set forth specific burden of proof standards. *See* Cal. Civ. Code §32941 (West 1970); Ga. Code Ann. §105-2002 (1968); Nev. Rev. Stat. §42.010 (1979); N.D. Cent. Code §32-03-07 (1977); S.D. Comp. Laws Ann. §21-3-2 (1979).

14. *See* 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practices* §§16.08-.10, at 10-17 (1981).

15. *Id.* §16.07, at 8-10.

16. *See, e.g., Firestone v. Crown Center Redevelopment Corp.*, 693 S.W. 2d 99, 110 (Mo. 1985); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1272 (1980); *Team Central Inc. v. Teamco, Inc.*, 271 N.W. 2d 914, 926 (Iowa 1978); *Earl T. Browder, Inc. v. County Court of Webster County*, 145 W. Va. 696, 116 S.E. 2d 867, 8723 (1960); *Louisville and N.R. Co. v. Complete Auto Transit, Inc.*, 259 S.W. 2d 483, 484 (Ky. App. 1953).

17. The varying state substantive laws on punitive damages will further complicate manageability problems if a class for compensatory damages is certified under Rule 23(b)(3) and a mandatory class for punitive damages is certified under Rule 23(b)(1)(B) and (b)(2). *See Celotex Corp. v. School District of Lancaster, petition for cert. filed*, 55 U.S.L.W. 3114 (U.S. July 29, 1986) (No. 86-140), Part IV, at 20-29.

jurisdiction and then sort and apply the differing and unequal burdens of proof, standards and evidentiary guidelines applicable in each jurisdiction. The District Court will then have to decide whether each plaintiff sustained its individual burden of proof against individual defendants based upon the specific circumstances applicable to each relationship existing between each plaintiff school district and each defendant at a given time. Such a proliferation of dissimilar questions of law precludes satisfaction of the requirements of Rule 23(a)(2).[18]

The typicality requirement is related to the prerequisite that there be common questions of law and fact and similar considerations demonstrate that typicality is lacking in this case. Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class" in order for an action to be maintained as a class action. Fed. R. Civ. P. 23(a)(3). In this case, the claims of the representative parties are specific, unique, uncommon and not "typical".

As stated, the different state laws governing punitive damage awards must be applied under *Erie Railroad* and the independent and separate relationships between each plaintiff and each defendant as to each product at

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18. The Third Circuit was keenly aware of the magnitude and dangers of the task of interpreting and applying numerous state laws, and quoted the observation of one commentator that a very real "danger of . . . mistaken application" of state law exists due to the district court's own unfamiliarity with the intricacies of each state's laws and the "sheer magnitude" of the burden of interpreting various state laws. *School Asbestos Litigation, supra*, 789 F. 2d at 1010 n. 11, *quoting* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification,* 92 Harv. L. Rev. 718, 742 (1979). Despite this awareness, the Third Circuit failed to consider the related task required under *Erie Railroad* of predicting how each state's highest court would decide questions of first impression when they inevitably arise in these proceedings. In such forays into the realm of uncharted state substantive law, the burden upon the district court and the potential for error is undeniable.

a given time must be analyzed under applicable state laws before any punitive damages may be awarded. In cases where, as here, individual relationships between the parties are unique, typicality is negated.[19]

Moreover, it has been held that typicality is inherently destroyed where, as here, establishment of the individual involvement of each defendant is a key element of plaintiff's burden of proof.[20]

This litigation is very different from other mass tort litigation. The prerequisites of commonality and typicality may be met in cases involving one defendant, one product or one accident. In such cases, common questions of fact and law may be identifiable and the limited scope of the proceeding may enable satisfaction of commonality and typicality requirements. The instant case, with its involvement of numerous parties and products over more than three decades, spawns countless different questions of fact and law and atypical claims brought under different state laws and subject to different defenses available under state law. Thus, it is the very nature of this unique case which precludes satisfaction of the prerequisites of commonality and typicality.

B. Lack of Adequate Representation of Class Interests Required Under Rule 23(a)(4)

Plaintiffs plan to meet the "most stringent test of liability" standard in all applicable categories of state substantive law, ranging from the sufficiency of the pleadings to the burdens of proof and evidentiary criteria applicable to the claims. This proposal immediately ren-

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19. *See, e.g., Beebe v. Pacific Realty Trust*, 99 F.R.D. 60 (D. Or. 1983); *Bogle v. Crow-Brighton Co.*, 96 F.R.D. 1 (W.D. Okla. 1981); *Oakland County Hearing Aide Service v. Sonotone Corp.*, 23 Fed. R. Serv. 2d (Callaghan) 1431 (E.D. Miss. July 22, 1977).

20. *Smith v. Toyota Motor Sales USA, Inc.*, 1977-1 Trade Cas (CCH) ¶61, 252 (N.D. Cal. Jan. 11, 1977) (where numerous car dealers were involved in alleged conspiracy, requirement of proving individual dealer's involvement precluded finding of typicality).

ders inadequate the representation of class interests in this case.

Rule 23(a)(4) requires as a final minimum prerequisite that "the representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The obvious issue is whether the representative parties can fairly and adequately protect the interests of all the absent class members by subjecting all claims to the highest requirements of law at every juncture in the proceedings despite the existence of less rigid standards in different jurisdictions which individual class members would face but for the class certification. The question must be answered in the negative.[21]

Since the requirements for punitive damages change according to jurisdiction, the proposal by the putative class representatives to adhere to the most stringent standards at all times will require some class members to meet standards that would not otherwise apply. The proposal proves the inadequacy of the representation of class interests. *Compare East Texas Motor Freight v. Rodriquez*, 431 U.S. 395, 403-05 (1977).

The proposed adherence to the most stringent requirements of substantive state law violates the *Erie Railroad* strictures against creation of a patchwork quilt of federal common law woven from the substantive laws of each jurisdiction. Although it acknowledged the requirement of applying each state's substantive laws, the Court of Appeals deferred to the plaintiffs' proposal for application of the most stringent state law applicable at each stage of the proceedings, thereby improperly countenancing creation of a federal common law. The putative class representatives cannot fairly and adequately protect the interests of the class by their proposal and Rule 23(a)(4) has not been satisfied.

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21. Celotex raised this consideration parenthetically in its Petition for Writ of Certiorari. *See Celotex Corp. v. School District of Lancaster, petition for cert. filed*, 55 U.S.L.W. 3114 (U.S. July 29, 1986) (No. 86-140), Part IV, at 21 n. 17.

CONCLUSION

Under oft-repeated principles of law, a case may not proceed as a class action unless the prerequisites of Rule 23 have been met. *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982); *East Texas Motor Freight v. Rodriquez*, 431 U.S. 395 (1977). Rule 23 requirements have not been satisfied in this case and these proceedings should be denied class action status. This specific litigation is unique in its involvement of the many different products and the defendants who may have been associated with these different products in numerous ways over several decades. Lacking in these proceedings are the basic, minimum prerequisites for class treatment. The unique nature of this case precludes the existence of any significant common questions of law or fact owing to the broad disparity of products and parties and the varying substantive laws of each jurisdiction. These unique circumstances also preclude satisfaction of the typicality requirement under Rule 23(a)(3) in that each putative member's claim is necessarily atypical. By proposing a most stringent test of liability at all points in this proceeding, the putative class representatives do not fairly and adequately represent the interests of the class and fail to satisfy Rule 23(a)(4).

Certification of a mandatory class for punitive damages under Rule 23(b)(1)(B) would improperly place the cart before the horse. Petitioners assume that plaintiffs have a protectable right to or interest in punitive damages under Rule 23(b)(1)(B) when they do not.[22] Peti-

22. On the contrary, the rationale behind punitive damages punishment and deterrence of the wrongdoer and plaintiffs' interests are not implicated. *See In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 521 F. Supp. 1188 and 526 F. Supp. 887, 899 (N.D. Cal.), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *See also* Restatement (Second) of Tort §908, comment c (1979); 3 H. Newberg, *Newberg on Class Actions* §17.29, at 406-09 (2d ed. 1985).

tioners also fail to comprehend that a class for compensatory damages would first have to be approved. Fibreboard has joined with Celotex and others seeking a review of the Third Circuit's affirmance of a 23(b)(3) class. Any decision on certification of a punitive damages class necessarily depends upon whether a class for compensatory damages is certified. Fibreboard and others seek review of the certification of a 23(b)(3) class for compensatory damages and a reversal of that certification would preclude any punitive damage class.

The very nature of this case, then, militates against satisfaction of Rule 23 requirements and this matter should not proceed as a class action under any subsection of Rule 23. For these reasons, Fibreboard objects to the petitioners' positions on class certification. If both Petitions are granted, Fibreboard requests this Court to affirm the Third Circuit's vacation of certification under Rule 23(b)(1)(B) and to affirm the denial of certification under Rule 23(B)(2) and to reverse the certification of a class under Rule 23(b)(3).

Respectfully submitted,

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